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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

ELIZABETH ZACHARY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Louisiana law provides that the maximum punishment available for obstruction of justice depends on the seriousness of the proceeding obstructed. The judge, not the jury, decides what kind of proceeding the defendant obstructed. The judge's determination that Petitioner had obstructed a capital case exposed her to a sentencing ceiling eight-times greater than the maximum punishment authorized by the jury's verdict alone. The judge sentenced her to 20 years -- twice the maximum amount authorized by the jury's verdict. The question presented is whether Louisiana law, which permits a judge to determine what kind of proceeding the defendant obstructed, violates the Sixth Amendment rule that any fact (other than a prior conviction) that increases the maximum available punishment must be proven to a jury beyond a reasonable doubt.

PARTIES TO THE PROCEEDING

The petitioner is Elizabeth Zachary, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THIS WRIT 12

I. The Determination of the Underlying Offense is a Factual Determination that Increases the Sentencing Ceiling Beyond that Authorized by the Jury Verdict Alone. 12

II. Louisiana's Statutory Scheme Creates An Intractable and Ongoing Problem That Warrants this Court's Intervention. 16

CONCLUSION 18

APPENDIX:

APPENDIX A

The judgment of the Louisiana First Circuit Court of Appeal is reported at 973 So. 2d 176 (La. App. 1 Cir. 12/21/2007) 1a

APPENDIX B

Justice Kimball's concurrence..... 26a

APPENDIX C

The Louisiana Supreme Court judgment denying discretionary review and Justice Kimball's concurrence are reported at *State v. Zachary*, 08-K-634 (La. 11/21/08); 995 So. 2d 631 ..... 27a

APPENDIX D

Justice Johnson's dissent 32a

TABLE OF AUTHORITIES

CASES:

Apprendi v. New Jersey,
530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington,
542 U.S. 296 (2004) 12, 14

Cunningham v. California,
549 U.S. 270 (2007) 12

Jones v. United States,
526 U.S. 227 (1999) 10, 13, 14, 17

Ring v. Arizona,
536 U.S. 584 (2002) 12

State v. Hookfin,
602 So. 2d 757 (La..App. 4 Cir. 1992) 17

State v. Jones,
610 So. 2d 1014 (La. App. 1 Cir.
11/22/1992)..... 17

State v. McKnight,
739 So. 2d 343 (La. App. 1 Cir. 06/25/1999),
writ denied 755 So. 2d 247 17

State v. Newton,
973 So. 2d 916 (La. App. 2 Cir.
12/19/2007)..... 19

State v. Uloho,
875 So. 2d 918 (La. App. 5 Cir. 05/26/2004)
writ denied 888 So. 2d 192 16-17

State v. Zachary,
07-KA-0678 (La. App. 1 Cir. 12/21/07);
973 So. 2d 176 ..... 1, 10

State v. Zachary,
829 So.2d 405 (La. 2002) 9

United States v. Booker,
543 U.S. 220 (2005) 12

CONSTITUTIONAL PROVISIONS AND STATUTES:

United States Constitution

Fifth Amendment 2
Sixth Amendment ..... i, 2, 12, 14, 16
Fourteenth Amendment 2

United States Code

18 U.S.C. § 2119 (1988 ed., Supp. V) 13, 14
28 U.S.C. § 1257(a) 1

La. R.S. 14:130.1 ..... *passim*
La. R.S. 15:529.1 ..... 3, 5

MISCELLANEOUS:

2 J. Story, Commentaries on the Constitution of the United States 540 (4th ed. 1873)..... 17

Akhil Reed Amar, The Bill of Rights 84 (1998) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Elizabeth Zachary respectfully petitions for a writ of certiorari to the First Circuit Court of Appeal in *State v. Zachary*, 07-KA-0678 (La. App. 1 Cir. 12/21/07); 973 So. 2d 176.

OPINION BELOW

The judgment of the Louisiana First Circuit Court of Appeal is reported at 973 So. 2d 176 (La. App. 1 Cir. 12/21/2007) and is reprinted in the appendix at Pet. App. A. 1a-25a. The Louisiana Supreme Court judgment denying discretionary review is reported at *State v. Zachary*, 08-K-634 (La. 11/21/08); 995 So. 2d 631 and is reprinted in the Appendix at Pet. App. B. 26a. Justice Kimball's concurrence is reprinted at Pet. App. C. 27a-31a. Justice Johnson's dissent is reprinted at Pet. App. D. 32a.

JURISDICTION

The judgment and opinion of the Louisiana First Circuit Court of Appeal was entered on December 21, 2007. The Louisiana Supreme Court denied review on November 21, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . ..

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury[.]

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Louisiana Revised Statute 14:130.1 provides, in pertinent part:

> B. Whoever commits the crime of obstruction of justice shall be subject to the following penalties:

> (1) When the obstruction of justice involves a criminal proceeding in which a sentence of death or life imprisonment may be imposed, the offender shall be fined not more than one hundred thousand dollars, imprisoned for not more than forty years at hard labor, or both.
>
> (2) When the obstruction of justice involves a criminal proceeding in which a sentence of imprisonment necessarily at hard labor for any period less than a life sentence may be imposed, the offender may be fined not more than fifty thousand dollars, or imprisoned for not more than twenty years at hard labor, or both.
>
> (3) When the obstruction of justice involves any other criminal proceeding, the offender shall be fined not more than ten thousand dollars, imprisoned for not more than five years, with or without hard labor, or both.

Louisiana Revised Statute 15:529.1 provides, in pertinent part:

> A. (1) Any person who, after having been convicted within this state of a felony . . . thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> (a) If the second felony is such that upon a first conviction the offender

> would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction . . .

STATEMENT OF THE CASE

This case presents the Court with a straightforward application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As *Apprendi* held, "[t]he Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 476.

A jury convicted Petitioner, Elizabeth Zachary, of obstruction of justice for assisting in the movement of a body in the immediate aftermath of a homicide that she did not commit. The jury did not make any findings about the type of criminal proceeding that Petitioner obstructed. Instead, acting pursuant to state law, the trial court unilaterally determined that Petitioner had obstructed a capital proceeding.[1] The trial court's

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[1] Dissenting from the Louisiana Supreme Court's decision denying review in this case, Justice Johnson wrote: "Stated simply, Zachary, in effect, received an enhancement for a life sentence for which no one was ultimately convicted." See Pet. App. D. at 33a. Justice Johnson's observations underscore the point that the determination of what kind of criminal proceeding the defendant obstructed is not simply an administrative matter.

factual-finding exposed Ms. Zachary to an eight-times more severe maximum punishment (80 years) than the 10-year maximum authorized by the jury verdict and Petitioner's criminal record.[2] Ultimately, the trial court sentenced Ms. Zachary to 20 years, twice the length of the maximum punishment authorized by the jury's verdict alone.[3]

1. On July 9, 1993, a dispatcher for the Walker, Louisiana police department received a call concerning a suspicious person at a nearby mini-storage facility. Pet. App. A. 3a. Arriving at the scene, officers and parish deputies found a woman passed out at the wheel of a vehicle later determined to belong to a man named George Taylor.[4] *Id.* Officers also found a highly intoxicated male (later

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[2] Petitioner was sentenced as a second offender under a habitual offender statute that required her to receive a range of sentence from one-half the maximum sentence to twice the maximum sentence. *See* La. R.S. 15:529.1 (A)(1)(a) (which provides that the sentence for a second felony offense "shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction."). The trial court's determination that petitioner had violated La. R.S. 14:130.1(B)(1) rather than La. R.S. 14:130.1(B) (3) resulted in a shift in ranges from 2 and one-half - 10 years to 20-80 years.

[3] *See Apprendi*, 530 U.S. at 495 ("the potential doubling of one's sentence" is "unquestionably of constitutional significance"); *id.* ("When a judge's finding . . . authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" (internal citations omitted)).

[4] Detectives found the body of George Taylor off the side of the road near Petitioner's house the following morning. Pet. App. A. 4a.

identified as Paul Weber, Petitioner's boyfriend) and a rolled-up, blood-soaked rug near the vehicle. *Id.*

The woman was so intoxicated that officers had to shake and yell at her before she would wake. R. 1086, 1098, 1106, 1117. She could tell them only her name: Elizabeth Zachary. R. 1098.

Officers brought an inebriated Zachary to the police station for interrogation.[5] Zachary informed detectives that Taylor had come to her house, where she lived with her boyfriend, Paul Weber. Pet. App. A. 5a. The three sat around the house drinking. *Id.* At some point, she got up to go to the bathroom to fix one of her contact lenses. *Id.* When she came back, Weber was hitting Taylor with a shovel. *Id.* She could not stop Weber and she heard him tell Taylor that he (Taylor) was not going to bother her (Zachary) anymore.[6] *Id.* Zachary admitted that she

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[5] Officers testified that because Petitioner neither fell down nor fell asleep during the interrogation, she had voluntarily waived her *Miranda* rights. Pet. App. A. 22a. Detective Foster did testify that Zachary still appeared to be drunk when he spoke to her at 11:45 p.m. R. 1272-73, 1295. He admitted that he could not "make sense" of much of the conversation with Zachary. R. 1290. Detective Jeansonne testified that he approached Zachary two hours after her statement to Foster, at approximately 1:20 a.m. on July 10, and got her to sign a search waiver for her house. R. 1167-68. Jeansonne did not use the waiver, however, and ultimately got a search warrant because he felt Zachary was so intoxicated she did not know what she was doing. R. 1168. The trial judge expressed great concern about the defendant's intoxication but denied the motion to suppress the statement nevertheless. R. 1293.

[6] Zachary described how she met Taylor a few days before the incident when he asked her if she would be interested in cleaning his house. Pet. App. A. 5a. She agreed to

helped Weber move the rug in which he had rolled Taylor's body, but emphasized her fear of Weber, stating that he threatened and screamed at her and warned her not to try to use the phone. *Id.*

On August 9, 1993, a Livingston Parish Grand Jury indicted Zachary and Weber for the first-degree murder of George Taylor. R. 59. Mr. Weber ultimately pled guilty to manslaughter and was sentenced to forty years – with all but thirteen years suspended. Pet. App. D. 31a.

On January 9, 1995, Zachary entered into a plea agreement with the state for a reduced charge of accessory after the fact. R. 149-51. In the plea agreement, Zachary agreed "to give full and truthful testimony concerning all matters within her knowledge concerning . . . the death of George Taylor . . . and of the participation therein of Paul Weber" and to cooperate with investigating officers in advance of trial regarding such matters. R. 149. The state made an oral motion to annul this agreement on June 22, 1995; the defense responded by filing a Motion to Enforce the Plea Agreement. R. 18, 153-54.

Making the factual finding that Zachary "fully embraced" her taped statement to the police and that disputes over purported inconsistencies were primarily matters of "semantics," the trial court granted the defense motion to enforce the plea

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discuss it with him at his place, but his erratic driving frightened her to the point where she called her neighbor, Donald Blount, to come get her. Pet. App. A. 5a. On the day of the incident, Taylor showed up at Petitioner's place uninvited. *Id.*

agreement. R. 242-45. On March 29, 1996, over a dissent, the Louisiana First Circuit Court of Appeal reversed. R. 135. The Louisiana Supreme Court denied Zachary's writ requesting review of the reversal. R. 252.

The State then amended the charges against Petitioner to Obstruction of Justice, a violation of La. R.S. 14:130.1. R. 59. Zachary pled not guilty. R. 39. The trial court did not instruct the jury on the various grades of obstruction of justice. The jury returned a guilty verdict, without any indication of what kind of proceeding was obstructed. R. 39.

2. The trial court determined that Petitioner obstructed a capital proceeding. R. 337, 720-24. Accordingly, Petitioner was sentenced as a second offender to a mandatory term of twenty years imprisonment.[7] *Id.*

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[7] The habitual offender proceeding was not without controversy. The state did not file its request to sentence Zachary as a second offender until one month after she was convicted on the obstruction charge. R. 300-01. The trial court refused to sentence Petitioner as an habitual offender due to questions concerning the constitutionality of Petitioner's decade-old no contest plea to attempted burglary. R. 337. Specifically, the court expressed concern that that the submitted exhibits did not reflect a plea colloquy in the Florida court. R. 346. The prosecutor answered that she would rely solely on the plea form and was not sure the transcript existed. *Id.* Sixteen months later, the state moved to re-open habitual sentencing proceedings. R. 368. The trial court denied the motion, noting that the state's contention that the Florida transcript had been "unavailable" at the time of the initial hearing was "incorrect." R. 366-67. The state filed a motion to request written reasons for the trial court's refusal to invoke the habitual offender act. The trial court complied: "This court is not going to sentence Elizabeth Zachary as an Habitual

Petitioner appealed on a number of grounds, including the unconstitutionality of the trial court's

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Offender to 'make up' for the fact that the actual killer, Paul Weber, was allowed to plea to a reduced charge before trial and before this court heard evidence that established that Paul Weber was the actual killer. Two wrongs don't make a right." R. 371. The state sought Writs from the First Circuit and that court vacated the trial court's ruling. R. 387. On reconsideration, the trial court found insufficient evidence to establish that Zachary was a habitual offender because the transcript of the Florida plea did not include a colloquy regarding waiver of the right to trial, to remain silent, and the right of confrontation. R. 407. The trial court again noted its concerns that the state perceived it made a "mistake" with the Weber plea and then "zeroed in" on the Zachary sentence to "pay for" the mistake. R. 464-67. The First Circuit denied the state's request for a Writ, but the Louisiana Supreme Court reversed the trial court and remanded for another habitual sentence proceeding. R. 602-03; *State v. Zachary*, 829 So.2d 405 (La. 2002). On October 3, 2003, the defense filed a Motion to Quash Habitual Offender Bill of Information Based on Prosecutorial Vindictiveness, alleging on information and belief that the Taylor family was "extremely upset" with the Weber plea and that the state was seeking to punish Zachary for exercising her right to trial. R. 544-45. The hearing on this motion was continued on November 3, 2003; it does not appear from the minutes that a ruling ever issued. R. 48. More than a year elapsed before the state took any further action to reopen the habitual offender issue. R. 550-51. In the interim a different trial judge took the bench. On October 26, 2005, Zachary appeared before the new judge for habitual offender sentencing. By this time, Zachary had served almost five years of her original ten-year sentence and had been released on parole on April 11, 2001. R. 602-03. Her parole supervision was scheduled to end on July 9, 2006. *Id.* Counsel argued at sentencing that imposition of the habitual offender sentence would be excessive in light of Zachary's many accomplishments since her release. R. 606. The sentencing court rejected these arguments, found that Zachary was a second felony offender for obstructing the crime of murder, and sentenced her to 20 years imprisonment. R. 720, 724.

determination that she had obstructed a capital proceeding rather than any other criminal proceeding.

3. The First Circuit Court of Appeal affirmed the conviction and sentences, rejecting all claims on appeal, including claims under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999). *See State v. Zachary*, No. 07-KA-0678 (12/21/2007), 973 So. 2d 176. The Court recognized the claim at issue:

> In assignment of error number 5, the defendant argues LSA-R.S. 14:130.1 violates the rule of *Apprendi* by giving the sentencing judge the authority to decide the grade of the offense.

Pet. App. A at 9a. While the court conceded the vitality of *Apprendi* and *Jones*, it held:

> The State's acceptance of [Zachary's co-defendant's] guilty plea to manslaughter did not preclude the State from trying [Zachary] for the crime of obstruction of justice involving an offense greater than manslaughter. Determining whom, when, and how to prosecute are matters within the discretion of the district attorney. See LSA-Const. art. V, § 26(B); LSA-C.Cr.P. art. 61. . . . That decision did not limit the district attorney from exercising his discretion and prosecuting the defendant herein for obstruction of justice regarding an offense greater than manslaughter.

Pet. App. A. at 12a-13a.

The Louisiana Supreme Court denied Petitioner's request for discretionary review. Pet. App. B. 26a. Justice Kimball filed a concurrence on the issue of the timeliness of the habitual offender sentencing. Pet. App. C. 27a. Justice Johnson filed a dissent on both the issue of the timeliness of the habitual offender sentencing and the lack of fundamental fairness in what had occurred below.[8] Pet. App. D. 32a.

Ms. Zachary is currently out on bond pending disposition of certiorari proceedings at this Court.[9]

This Petition for Certiorari ensues.

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[8] *See* Pet. App. D. at 33a ("The defendant is now sentenced to a total of 20 years imprisonment, without the benefit of parole or probation, for her part in covering up the death of George Taylor, while the killer, Paul Weber, has been sentenced to a total of 13 years in custody for the actual killing."); *id.* at 34a ("Seven (7) years is NOT a "reasonable time" for final adjudication of the habitual offender issue." (emphasis in original)).

[9] As Justice Johnson underscored, since being released from incarceration, Ms. Zachary

> has, from all accounts, busied herself with her own rehabilitation, excelling at university studies, maintaining gainful employment and is living as a productive member of society. Her case deserves more than a cursory review. She enrolled in, and completed, a paralegal studies certification course at Louisiana State University, re-married, attended church services devoutly, and from all accounts became a model citizen.

Pet. App. D. at 33a-34a.

REASONS FOR GRANTING THIS WRIT

Ms. Zachary committed obstruction of justice almost fifteen years ago. She was convicted eleven years ago. She was sentenced nine years ago, completed serving that sentence almost seven years ago, and completed her parole supervision successfully nearly two years ago. Ms. Zachary's re-imprisonment would result solely on the basis of a judicially found fact that increased her maximum potential punishment by eight-times the maximum authorized by the jury's verdict alone. This Court should step in and reaffirm that its Sixth Amendment Jurisprudence does not allow for such a result.[10]

I. The Determination of the Underlying Offense is a Factual Determination that Increases the Sentencing Ceiling Beyond that Authorized by the Jury Verdict Alone.

Without a finding that Petitioner had obstructed justice in a capital or felony proceeding, Petitioner – as a second offender – was subject to a sentencing range of 2 and one-half to 10 years.

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[10] This interpretation of the Sixth Amendment has applied to the Federal Sentencing Guidelines, Washington state's sentencing scheme, California's Determinate Sentencing Law, and Arizona's Death Penalty Law to the extent they permitted judicial fact-finding of aggravating facts to justify the imposition of a sentence greater than the maximum authorized by the jury's verdict or the defendant's admissions. *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Cunningham v. California*, 549 U.S. 270 (2007); *Ring v. Arizona*, 536 U.S. 584 (2002).

Based upon the trial court's determination that she had obstructed justice in a capital proceeding, Petitioner was exposed to 80 years imprisonment and sentenced to the statutory minimum of 20 years.

The trial court's determination that Petitioner obstructed justice in a capital case is functionally no different than the carjacking statute at issue in *Jones v. United States*, 526 U.S. 227 (1999). In *Jones*, the Court addressed a defendant charged *inter alia* with "carjacking or aiding and abetting carjacking, in violation of U.S.C. § 2119." *Id.* at 230. The relevant statute provided:

> "Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall
>
> "(1) be fined under this title or imprisoned not more than 15 years, or both,
>
> "(2) if serious bodily injury (as defined in section 1365 of this title)results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> "(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both."

Id. (citing 18 U.S.C. § 2119 (1988 ed., Supp. V)).

The jury found Jones guilty of violating § 2119, but Jones was sentenced to twenty-five years under section (2) of the statute after the judge made the factual finding that the defendant had caused "serious bodily injury."[11] The statute in this case operates in an equivalent manner to the statute in *Jones*.

This Court's subsequent jurisprudence clarifies that *Jones* depended not upon statutory construction but constitutional principles. *Apprendi* plainly held that permitting a defendant to be sentenced above the statutory maximum based upon factual determinations made by a judge rather than a jury violated the core values of the Sixth Amendment. *Blakely v. Washington* similarly secured a defendant's right to a jury determination of all facts other than a prior conviction. In *Blakely*, the Court disbanded a sentencing scheme that permitted the judge to impose a sentence above the standard range if he found the existence of an aggravating factor that demonstrated "substantial and compelling reasons justifying an exceptional sentence." *Blakely*, 542 U.S. at 303-04 (2004) (the relevant "statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings."). Here, the trial court's finding that Petitioner obstructed justice in a first-degree murder proceeding permitted the judge to sentence Zachary within an entirely different range.

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[11] In *Jones*, the Court explicitly rejected the Government's contention that the subsections represented only sentencing considerations rather than elements of the offense, finding that construing the statute in such a way would leave it open to constitutional doubt. *See id.* at 240.

The First Circuit reasoned that the district judge was entitled to sentence Petitioner under La. R.S. 14:130.1 (B) (1) (obstruction of justice in a capital case) because the statute was intended to be interpreted based upon the charge at the date of the underlying offense. *See* Pet. App. A. at 11a. This reasoning dictates only how the section of the obstruction of justice statute is determined but is silent on the more important question of who -- judge or jury -- should make that determination.

The decision below further suggests that *Apprendi* does not control because the determination of what criminal proceeding the defendant obstructed should be dictated by the charging practices of prosecutors: "Determining whom, when, and how to prosecute are matters within the discretion of the district attorney." Pet. App. A. at 12a-13a. This may well be true, but the Framers interposed the criminal petit jury between the State and the defendant as a check against precisely this type of unfettered discretion. *See Apprendi*, 530 U.S. at 477 (identifying the jury "as the great bulwark of [our] civil and political liberties." (citing 2 J. Story, Commentaries on the Constitution of the United States 540-41 (4th ed. 1873)).

The "leave it to the prosecutors" solution is particularly troubling where, as here, the obstruction occurs prior to the commencement of any criminal proceedings, and thus allows the state to ratchet up the underlying charge to maximize the defendant's overall sentencing exposure. In fact, undertones of prosecutorial vindictiveness coupled with the state's decision to renege on the plea agreement make this case a paradigmatic example of why the Framers intended that the jury trial right

would protect the defendant against even the appearance of prosecutorial or judicial overreaching. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 84 (1998) ("Just as the militia could check a paid professional standing army, the jury could thwart overreaching by powerful and ambitious prosecutors and judges.").

The finding of what type of criminal proceeding the defendant obstructed is an element of the offense of obstruction of justice. Recasting the finding as a pedestrian fact dictated by prosecutorial charging decisions or as administrative judicial fact-finding cannot be reconciled with either the Framers' intended role of the criminal petit jury or with this Court's Sixth Amendment jurisprudence.

II. Louisiana's Statutory Scheme Creates An Intractable and Ongoing Problem That Warrants this Court's Intervention.

This Court should grant certiorari to address the confusion that permeates the Louisiana courts' application of *Apprendi*. The First Circuit's construction of La. R.S. 14:130.1 (Obstruction of Justice) in this case is not an aberration, but reflects the Louisiana courts' persistent unwillingness to accept *Apprendi* full-throttle.

With alarming regularity, defendants in Louisiana are convicted of obstruction of justice under circumstances in which the judge rather than a jury determines the underlying proceeding that the state claims the defendant obstructed. *See State v. Uloho*, 875 So. 2d 918, 933 (La. App. 5 Cir. 05/26/2004) *writ denied* 888 So. 2d 192 (La., 11/19/2004) (upholding conviction for La. R.S.

14:130.1 (B) (2) and sentence to twenty-five years as a second felony offender); *State v. McKnight,* 739 So. 2d 343 (La. App. 1 Cir. 06/25/1999), *writ denied* 755 So. 2d 247 (La. 2/25/2000) (upholding trial court's determination that defendant obstructed murder prosecution even though no indictment was ever issued as "La. Rev. Stat. Ann. § 14:130.1 applies to situations involving a murder investigation without a formal indictment."); *State v. Jones*, 610 So. 2d 1014, 1016 (La. App. 1 Cir. 11/22/1992) ("we find the trial court's determination that the appropriate penalty provision for obstruction of justice could not be determined until the underlying criminal proceeding was resolved is not supported by the language of the statute. The term 'criminal proceeding' encompasses action by both law enforcement personnel and judicial authorities; and the nature of the underlying criminal proceeding, for purposes of determining the appropriate section of the obstruction of justice statute, should be determined by the dates on which the acts of obstruction occurred."); *State v. Hookfin*, 602 So. 2d 757, 758 (La..App. 4 Cir. 1992); *State v. Newton*, 973 So. 2d 916, 922 (La. App. 2 Cir. 12/19/2007) (finding no *Apprendi* violation for sentence of fifteen years as "The trial court was only required to make a determination of the underlying criminal proceedings (as charged in the bill) that were the basis for the obstruction of justice charge.").

This Court should grant certiorari to address the Louisiana courts' application of *Jones* and *Apprendi*, or in the alternative, summarily reverse the Louisiana First Circuit's holding that *Apprendi* does not apply to this determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

APPENDIX A

The judgment of the Louisiana First Circuit Court of Appeal is reported at 973 So. 2d 176 (La. App. 1 Cir. 12/21/2007) 1a

APPENDIX B

Justice Kimball's concurrence..... 26a

APPENDIX C

The Louisiana Supreme Court judgment denying discretionary review and Justice Kimball's concurrence are reported at *State v. Zachary*, 08-K-634 (La. 11/21/08); 995 So. 2d 631 ..... 27a

APPENDIX D

Justice Johnson's dissent 32a

APPENDIX A

Court Of Appeal Of Louisiana, First Circuit

STATE of Louisiana

v.

Elizabeth ZACHARY

NO. 2007 KA 0678 (La.App. 1 Cir. 12/21/07);

973 So. 2d 176

December 21, 2007, Judgment Rendered

JUDGES: BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ. Welch J, concurs without reasons.

CARTER, C.J.

PROCEDURAL HISTORY

The defendant, Elizabeth Zachary, was charged by grand jury indictment with first degree murder, a violation of LSA-R.S. 14:30, and pled not guilty. Thereafter, the indictment was amended to charge the defendant with obstruction of justice, a violation of LSA-R.S. 14:130.1, and the defendant pled not guilty. A jury found the defendant guilty as charged.

The State filed a habitual offender bill of information, therein alleging the defendant was a second-felony habitual offender. In response, the defendant filed her first motion to quash the habitual offender bill. Following a hearing, the trial court declined to invoke the provisions of the

habitual offender law and sentenced the defendant to ten years at hard labor. The defendant moved for reconsideration of her sentence, but the motion was denied. The State moved to reopen the hearing on the habitual offender bill, but the trial court denied the motion. Thereafter, this court granted the State's application for a supervisory writ, vacated the order denying the State's motion, and remanded the matter for a determination as to whether the defendant was a habitual offender and, if so, for resentencing. *State v. Zachary*, 00-0579 (La. App. 1 Cir. 4/24/00).

Following a hearing, the trial court found the evidence presented by the State to be constitutionally insufficient to find the defendant to be a habitual of-fender. The defendant filed a second motion to quash the habitual offender bill, and the trial court granted the motion. The State filed an application for supervisory writs, which this court denied. *State v. Zachary*, 01-2225 (La. App. 1 Cir. 11/5/01). Thereafter, the Louisiana Supreme Court reversed the trial court's granting of the first motion to quash the habitual offender proceedings. *State v. Zachary*, 01-3191 (La. 10/25/02), 829 So.2d 405 (per curiam). Subsequently, on remand from the supreme court, this court reversed the granting of the second motion to quash and remanded the case to the trial court for completion of the habitual offender proceedings. *State v. Zachary*, 01-2225R (La. App. 1 Cir. 6/16/03).

The defendant filed a third motion to quash the habitual offender bill.[1] Following a hearing, the trial

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[1] The record does not reflect a ruling on the third motion to quash the habitual offender bill but indicates a hearing on the

court found the defendant to be a second-felony habitual offender. The defendant was sentenced to twenty years at hard labor without benefit of probation or suspension of sentence.[2] The previously imposed sentence was vacated, and the time the defendant actually had served was deducted from the new sentence. The defendant now appeals, designating ten assignments of error. For the reasons that follow, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On July 9, 1993, at approximately 9:30 p.m., the Walker Police Department responded to a report of a suspicious person at the Interstate Mini-Storage on Walker South Road. At that location, the police found Paul Weber sitting on the side of the building and the defendant seated in the driver's seat of the vehicle of the victim, George T. Taylor. Both Weber and the defendant were intoxicated. Keys to the vehicle and to the victim's home were on the defendant's lap. The victim's wallet was on the floor in the rear of the vehicle. Grass and weeds were caught under the front bumper of the vehicle, and approximately 20 feet from the vehicle, the police discovered a dry rolled-up rug lying in wet grass.

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motion was held, and the matter was continued on motion of the defense.

[2] Although the trial court failed to state that the defendant's sentence was to be served at "hard labor," it did sentence the defendant to "twenty (20) years for the habitual offender petition, as in 14:130.1-B-1." Louisiana Revised Statutes 14:130.1B(1) provides for a sentence at hard labor. Additionally, the sentencing minutes reflect that the sentence was to be served with the Department of Corrections.

When the police unrolled the rug, they noticed a large amount of wet blood.

While the defendant was being booked for public intoxication, a corrections officer noticed that the legs of her jeans were splattered with fresh blood. Jail policy required injured prisoners to be taken to the hospital, so the corrections officer asked the defendant if she was injured. The defendant replied, "[N]o, ma'am, it's not my blood. It's someone else's."

The police went to the defendant's home and knocked on the unlocked door, but no one answered. They discovered blood on the outside of the steps and, fearing that the defendant's children might have been injured, went inside the home. There was blood splattered on the living room floor and on a wall. Blood and fresh, loose particles of dirt were found on the sofa. The rug in the defendant's bedroom matched the rug found near the victim's vehicle.

On the morning of July 10, 1993, the victim's body was discovered wrapped in a bedspread in tall grass, approximately one and three-tenths miles from the defendant's house. The victim suffered two fatal injuries, blunt head trauma and a stab wound in the chest. He also suffered a nonfatal stab wound close to his spine.

Kathy Bernard and Donna Peters met the defendant in jail and testified at trial. Bernard testified the defendant told her that she (the defendant) and Weber had invited the victim to the defendant's house on July 9, 1993. According to Bernard, the defendant stated that she saw Weber hit the victim with a shovel after they got into an argument. The

defendant told Bernard that she helped Weber roll the victim's body in a rug, place the body into the trunk of a car, and dump the body. The defendant and Weber then drove around until they were arrested. According to Bernard, the defendant stated she helped Weber because she loved him. Peters offered similar testimony, adding that although the defendant never told her that Weber threatened her (the defendant), the defendant did indicate she was scared and upset at the time of the incident.

The defendant's July 12, 1993, 8:25 a.m., audiotaped statement was played for the jury at trial. In the statement, the defendant stated she had known the victim for less than a week before the incident. She claimed that two days before the incident the victim had invited her and Weber to his house, where they drank beer together. The victim dropped Weber off and then drove with the defendant toward his house. The defendant stated she became frightened and told the victim she needed cigarettes so that he would take her to a store, but the victim drove her to his house anyway. The defendant claimed she telephoned her neighbor and asked him to come and get her from the victim's house, but the neighbor refused. The victim apologized for not taking her to the store and drove her to a gas station. The defendant called her neighbor from the gas station, and her neighbor picked her up. According to the defendant, the next day the victim called her house several times asking if she would clean and cook for him, and she told him that she would consider the offer.

The defendant maintained that on the night of the incident, the victim just showed up at her house. She stated that the victim was fine when she went into

the bathroom to adjust her contact lens. However, when she came out of the bathroom, the victim was on the rug in a pool of blood, and Weber was beating him with a shovel. She also claimed Weber forced another object into the victim with the shovel. The defendant claimed she was scared, frightened, and terrified of Weber. She claimed he yelled at her and, in a menacing, threatening tone, told her not to use the telephone. The defendant claimed Weber rolled the victim's body in the rug, put the rug into the victim's car, and ordered her into the car. She stated she did not know where Weber dumped the body.

When asked how she got blood on her knees, the defendant stated it was possible that she had helped Weber carry the rug out. She claimed she did not remember what had happened after the body was dumped and must have "blanked" out. When asked if Weber had indicated why he had hit the victim, the defendant claimed Weber told her the victim would not bother her again.

TIMELINESS OF HABITUAL OFFENDER ADJUDICATION

In assignment of error number 1, the defendant argues that the imposition of an enhanced sentence more than four years after the completion of her initial sentence, toward the end of her parole supervision, and in light of her rehabilitation since release, violated her right to a habitual offender hearing within a reasonable time and her constitutional right to a speedy trial.

Proceedings under a habitual offender bill filed pursuant to LSA-R.S. 15:529.1 need not be completed prior to the time the defendant satisfies

the original sentence imposed by the trial court. *State v. Muhammad*, 03-2991 (La. 5/25/04), 875 So.2d 45, 54. Although the habitual offender law, LSA-R.S. 15:529.1, does not specify a time within which a habitual offender bill of information must be filed, the district attorney must file the habitual offender bill within a reasonable time. *Id.*

The Louisiana Supreme Court also has held that a case-by-case evaluation is warranted to determine whether a habitual offender proceeding has been promptly concluded. *Muhammad*, 875 So.2d at 55. In evaluating whether delays in concluding the proceeding are unexplained or extraordinarily long, courts may look to relevant speedy trial considerations, including the length of the delay, the reasons for the delay, the accused's assertion of her right to speedy trial, and the prejudice to the accused resulting from the delay. *Id.* While these factors are neither definitive nor dispositive in the context of a habitual offender proceeding, they are instructive in determining whether the habitual offender hearing is held and the proceeding completed within a reasonable time. *Id.* "Abusive or vindictive delay should not be tolerated." *Id.*

The defendant was convicted of obstruction of justice on January 9, 1998; sentencing was set for March 26, 1998. On February 19, 1998, the State filed a habitual offender bill of information alleging the defendant was a second-felony habitual offender. On March 26, 1998, the trial court advised the defendant of her rights under the habitual offender law, gave the defense fifteen days to file objections to the habitual offender bill, and set the matter for a hearing on May 7, 1998. At that hearing, the defense filed its first motion to quash the habitual offender

bill of information. Over the course of these proceedings, the defense filed two more motions to quash the habitual offender bill of information. The State sought review of the trial court's unfavorable rulings on the first two motions, both of which resulted in reversal of the trial court's judgments. See *State v. Zachary*, 00-0579 (La. App. 1 Cir. 4/24/00); *State v. Zachary*, 01-2225 (La. App. 1 Cir. 11/5/01). *State v. Zachary,* 01-3191 (La. 10/25/02), 829 So.2d 405 (per curiam); *State v. Zachary*, 01-2225R (La. App. 1 Cir. 6/16/03).

The habitual offender bill of information was filed against the defendant within a reasonable time—approximately one month after the defendant's conviction. The initial habitual offender hearing also was held within a reasonable time—within three months of the filing of the habitual offender bill of information. Following this court's June 2003 decision, the matter was set for sentencing on September 15, 2003. The defendant then filed her third motion to quash the habitual offender bill of information. The third motion to quash was continued at defendant's request, and it was the State that moved, on February 22, 2005, to reopen the habitual offender issue. The matter was set for June 1, 2005, and the defendant moved for a continuance. The habitual offender adjudication was finally completed on October 26, 2005.

The delay in completing the habitual offender adjudication cannot be attributed to bad faith or vindictiveness on the part of the State. Rather, the delay is attributable to the defendant's exercise of her right to seek to quash the bill of information and the State's exercise of its right to seek review of adverse trial court rulings with this court and with

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 2, the defendant argues imposition of the mandatory minimum sentence under the habitual offender law was excessive and constituted cruel and unusual punishment.

The defendant failed to make or file a motion to reconsider sentence in accordance with LSA-C.Cr.P. art. 881.1. Accordingly, review of the instant assignment of error is procedurally barred. LSA-C.Cr.P. art. 881.1E; *State v. Duncan*, 94-1563 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

SENTENCING UNDER LSA-R.S. 14:130.1B(1); SUFFICIENCY OF INDICTMENT; CONSTITUTIONALITY OF LSA-R.S. 14:130.1 UNDER *APPRENDI*

In assignment of error number 3, the defendant argues the trial court erred in sentencing the defendant under LSA-R.S. 14:130.1B(1). In assignment of error number 4, the defendant argues the amendments to the indictment resulted in a violation of her right to be informed of the nature and cause of the accusation against her and the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In assignment of error number 5, the defendant argues LSA-R.S. 14:130.1 violates the rule of *Apprendi* by giving the sentencing judge the authority to decide the grade of the offense.

An accused in a criminal prosecution has a right to be informed of the nature and cause of the accusation against him. LSA-Const. art. I, §13. If the sufficiency of an indictment is not questioned at trial, the indictment is sufficient unless it is so defective that it does not, by any reasonable construction, set forth an identifiable offense against the laws of this state and inform the defendant of the statutory basis of the offense. *State v. Bass*, 509 So.2d 176, 178 (La. App. 1 Cir. 1987). Elements of an offense must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 232, 119 S.Ct. 1215, 1219, 143 L.Ed.2d 311 (1999). Any fact (other than a prior conviction) that increases the maximum penalty[3] for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476, 120 S.Ct. at 2355; *Jones*, 526 U.S. at 243 n.6, 119 S.Ct. at 1224 n.6.

Subsection B of LSA-R.S. 14:130.1 specifies the applicable penalties for an obstruction of justice conviction. Specifically:

> Whoever commits the crime of obstruction of justice shall be subject to the following penalties:
>
> (1) When the obstruction of justice involves a criminal proceeding in which a sentence of death or life

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[3] Under *Apprendi*, the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts as reflected in the verdict or admitted by the defendant. *Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004).

> imprisonment may be imposed, the offender shall be fined not more than one hundred thousand dollars, imprisoned for not more than forty years at hard labor, or both.
>
> (2) When the obstruction of justice involves a criminal proceeding in which a sentence of imprisonment necessarily at hard labor for any period less than a life sentence may be imposed, the offender may be fined not more than fifty thousand dollars, or imprisoned for not more than twenty years at hard labor, or both.
>
> (3) When the obstruction of justice involves any other criminal proceeding, the offender shall be fined not more than ten thousand dollars, imprisoned for not more than five years, with or without hard labor, or both.

The nature of the underlying criminal proceeding, for purposes of determining the applicable section of the obstruction of justice statute, LSA-R.S. 14:130.1, should be determined by the date on which the act of obstruction occurred. *State v. McKnight*, 98-1790 (La. App. 1 Cir. 6/25/99), 739 So.2d 343, 353, writ denied, 99-2226 (La. 2/25/00), 755 So.2d 247.

The defendant and Paul Weber were charged by grand jury indictment as having committed "first degree murder of George Taylor, in violation of Article R.S. 14:30 of the Louisiana Criminal Code," a crime that may be punished by death or life imprisonment. The indictment was amended on

February 27, 1997, to charge the defendant as follows:

> On or about 7/9/93 Elizabeth Zachary committed the crime of obstruction of justice in that she tampered with evidence of the *murder* of George Taylor with the specific intent of distorting the results of the criminal investigation &/or prosecution of the murder of George Taylor in violation of LRS 14:130.1. (Emphasis supplied.)

On January 6, 1998, the indictment again was amended to replace the phrase "of the murder of George Taylor" with the phrase "of the death of George Taylor." After the January 6, 1998, indictment had been read to the jury and prior to opening arguments, the trial court stated:

> Let me make one correction on here. It was corrected in one place but not another place. The Clerk read it correctly. It referred to the murder of George Taylor, and that's incorrect. We're dealing now with the death of George Taylor, a homicide, which is the killing of a human being. But that's it.

Although indicted for first degree murder, Weber ultimately pled guilty to manslaughter, a crime that carries "a sentence of imprisonment necessarily at hard labor for a period less than a life sentence." See LSA-R.S. 14:130.1B(2); LSA-R.S. 14:31. The State's acceptance of Weber's guilty plea to manslaughter did not preclude the State from trying the defendant for the crime of obstruction of justice involving an offense greater than manslaughter. Determining whom, when, and how to prosecute are matters

within the discretion of the district attorney. See LSA-Const. art. V, § 26(B); LSA-C.Cr.P. art. 61. With the consent of the district attorney, a defendant may plead to a lesser offense that is included in the offense charged in the indictment. LSA-C.Cr.P. art. 558. The district attorney, in the exercise of his discretion, accepted a manslaughter plea from Weber on a charge of first degree murder. That decision did not limit the district attorney from exercising his discretion and prosecuting the defendant herein for obstruction of justice regarding an offense greater than man-slaughter.

We also reject the defendant's claim that the amendments to the indictment violated her right to be informed of the nature and cause of the accusation against her. For approximately eleven months prior to the amendment of the indictment at trial, the defendant was specifically charged with tampering with evidence concerning the murder of George Taylor. Even after the amendment of the indictment, the record indicates the defense was well aware of the fact that the defendant was being tried for obstruction of justice in connection with an offense in which a sentence of death or life imprisonment could be imposed. See LSA-R.S. 14:130.1B(1). Defense counsel advised the jury that obstruction of justice can carry up to forty years. See *id.* Defense counsel also referred to the victim's killing as a "murder" in opening and closing arguments.

Considering all of these factors, it was not essential that the indictment state that the defendant tampered with evidence in connection with, specifically, the first degree or second degree murder of the victim in order to determine the grade of the

offense. Even if the failure to specifically refer to first degree or second degree murder in the indictment was error, substantial rights of the accused were not affected, and the omission was harmless. See LSA-C.Cr.P. art. 921; *United States v. Clinton*, 256 F.3d 311, 315-316 (5th Cir.), cert. denied, 534 U.S. 1008, 122 S. Ct. 492, 151 L. Ed. 2d 404 (2001) (*Apprendi* errors subject to harmless error analysis). So concluding, it is unnecessary for this court to address the challenge to the constitutionality of LSA-R.S. 14:130.1. Courts should refrain from reaching the constitutionality of legislation unless the issue is essential to the case or controversy. *Plainview Area Association v. State*, 05-0791 (La. 4/29/05), 900 So.2d 837, 838 (per curiam).

SUFFICIENCY OF LIST OF RESPONSIVE VERDICTS

In assignment of error number 6, the defendant argues the trial judge erred in failing to include responsive verdicts identifying the underlying criminal proceeding as a specific grade of murder, manslaughter, or a designated relative felony or misdemeanor, along with attempts to commit these offenses. She further argues that the failure of her trial counsel to object to the inadequate responsive verdicts constituted ineffective assistance of counsel. The verdict form submitted to the jury listed the responsive verdicts as: (1) Guilty of Obstruction of Justice; (2) Guilty of Attempted Obstruction of Justice; and (3) Not Guilty. The court instructed the jury as follows in regard to the penalty for obstruction of justice:

> Whoever commits the crime of obstruction of justice shall be subject to the following

> penalties: When the obstruction of justice involves a [proceeding], in this case the offender shall be fined not more than one hundred thousand dollars, imprisoned for not more than forty years at hard labor, or both.

Later, upon receipt of a note from the jury, the court again read the same instruction regarding the penalty for obstruction of justice. The jury found the defendant guilty of obstruction of justice.

There is no formal requirement as to the language of the verdict except that it must clearly convey the intention of the jury. LSA-C.Cr.P. art. 810; *State v. Young*, 469 So.2d 1014, 1021 (La. App. 1 Cir. 1985). When faced with an ambiguous verdict, the intent of the jury can be determined by reference to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of the verdict the court submitted. *Young*, 469 So.2d at 1021. The responsive verdicts presented to the jury herein were consistent with the evidence presented at trial, and the verdict was clear.

Finally, we reject the defendant's claim that the failure of trial counsel to object to the responsive verdicts presented to the jury constituted ineffective assistance of counsel. Ineffective assistance of counsel claims are analyzed under the two-pronged test developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that her trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment.

Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that, but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. *State v. Serigny*, 610 So.2d 857, 859-860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Neither *Apprendi* nor *Jones* had been decided at the time of trial. Accordingly, defense counsel did not render deficient performance by failing to object to the responsive verdicts presented to the jury on the basis of the holdings in those two cases. Because the defendant has made an inadequate showing that defense counsel rendered a deficient performance, it is unnecessary for this court to address the issue of prejudice. *Serigny,* 610 So.2d at 860.

These assignments of error are without merit.

UNCONSTITUTIONAL VAGUENESS OF LSA-R.S. 14:130.1

In assignment of error number 7, the defendant contends the provisions of LSA-R.S. 14:130.1 are so ambiguous that the statute is unconstitutionally vague. Issues not submitted to the trial court for decision will not be considered on appeal. Constitutional issues are no exception. *State v. Williams*, 02-1030, 02-0898 (La. 10/15/02), 830 So.2d

984, 988. The defendant failed to challenge LSA-R.S. 14:130.1 in the trial court. Accordingly, consideration of this assignment of error is pretermitted.

PLEA AGREEMENT

In assignment of error number 8, the defendant argues she was entitled to enforcement of her plea agreement with the State. On January 9, 1995, when the defendant was under indictment for first degree murder, she entered into a plea agreement with the State in order to avoid the possibility of the death penalty. The plea agreement indicated the defendant had tendered a plea of guilty to the lesser, included offense of accessory after the fact, with the understanding that she was to receive the maximum sentence of five years. The agreement set forth that the defendant would give full and truthful testimony concerning the death of George Taylor and of the participation of Paul Weber in Taylor's death.

After the State indicated it would break the plea agreement, the defense moved to enforce the plea agreement. At the hearing on the defendant's motion, the State indicated it had letters revealing that the defendant and Weber were communicating concerning ways for the defendant to back out of her statement, that the defendant had attempted to marry Weber, and that the defendant had given Weber's attorney a statement claiming her statement to the police was given under duress. The State indicated it could not in good conscience present a witness it knew would lie.

The trial court granted the defendant's motion to enforce the plea bargain, noting that the defendant

fully embraced the statement she had given to the police. The State applied to this court for supervisory writs, and this court reversed the ruling. Thereafter, this court denied the defendant's application for rehearing, and the Louisiana Supreme Court denied the defendant's application for supervisory writs. *State v. Zachary*, 95-2369 (La. App. 1 Cir. 4/19/96), writ denied, 96-1288 (La. 9/13/96), 679 So.2d 104.

The defendant offers no reason and the record provides no basis for this court to reverse itself concerning a ruling made eleven years ago, upon which this court denied rehearing, and upon which the Louisiana Supreme Court denied review.

This assignment of error is without merit.

MOTION TO SUPPRESS

In assignment of error number 9, the defendant contends the trial court erred in denying the motion to suppress the oral statement given by the defendant to Livingston Parish Sheriff's Office Chief of Detectives Kerney Foster on July 9, 1993, at 11:45 p.m. The defendant argues the trial court incorrectly applied the burden of proof at the hearing on the motion to suppress, and thus, the case must be remanded under *State v. Rowell*, 505 So.2d 978, 980-981 (La. App. 3 Cir.), writ granted, 506 So.2d 1216 (La. 1987), affirmed and amended, 517 So.2d 799 (La. 1988). The defendant also argues the trial court abused its discretion in denying the motion to suppress because Chief Foster testified that the defendant was still drunk when he spoke to her.

A defendant adversely affected may move to suppress any evidence from use at the trial on the

merits on the ground that it was unconstitutionally obtained. LSA-C.Cr.P. art. 703A. On the trial of the motion to suppress, the burden of proof is on the defendant to prove the ground of his motion, except that the State shall have the burden of proving the admissibility of a purported confession or statement by the defendant or of any evidence seized without a warrant. LSA-C.Cr.P. art. 703D.

It is well settled that for a confession or inculpatory statement to be admissible into evidence, the State must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements, or promises. LSA-R.S. 15:451. Additionally, the State must show that an accused who makes a statement or confession during custodial interrogation was first advised of her Miranda rights. *State v. Plain*, 99-1112 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 342.

The admissibility of a confession is, in the first instance, a question for the trial court; its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the confession are accorded great weight and will not be overturned unless they are not supported by the evidence. Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. *Plain*, 752 So.2d at 342.

Prior to trial, the defense moved to suppress oral inculpatory statements and/or confessions elicited by agents of the State of Louisiana as obtained through threats of violence and duress and in violation of the

defendant's rights under the United States Constitution and Louisiana Constitution. The State called Chief Foster to testify at the hearing on the motion to suppress, but then indicated it believed the burden of proof was on the defense because the defense was moving to suppress a statement. The defense agreed and questioned Chief Foster on direct examination.

No substantial rights of the accused were affected by the defense questioning Chief Foster on direct and redirect examination, rather than on cross-examination. The State established the foundation for the admissibility of the evidence that was the subject of the motion to suppress, and the defense was not denied any opportunity to challenge that foundation. Chief Foster indicated that the defendant had been arrested for public intoxication after she was discovered at the mini warehouse. Chief Foster advised the defendant of her Miranda rights prior to questioning her. He conceded in his report that the defendant was drunk when questioned at the Livingston Parish Jail and that he could make little sense of what she was saying. He indicated, however, the defendant was not so drunk that she could not understand her rights or answer his questions. The defendant responded well to certain questions but changed the subject when questioned about the victim. Chief Foster also conceded that he did not rely on the waiver for a search that he obtained from the defendant at 1:15 a.m. Although he felt the defendant understood what she was doing when she signed the waiver, he explained that a search warrant is better if the police have time to obtain a warrant, and the defendant was in jail. Also, Chief Foster was

reluctant to rely on a waiver from the defendant because she had been arrested for simple drunk [*sic*].

Chief Foster indicated the defendant entered the room to speak with him at 11:45 p.m. under her own power, without bumping into anything, and without falling down. She did not have trouble finding a chair. She did not fall asleep while being questioned and was not in a daze during questioning. She did not have slurred speech. After being advised of her Miranda rights, the defendant indicated she understood those rights. Chief Foster indicated that approximately two and one-quarter hours passed between the time the defendant was arrested and the time he questioned her at the Livingston Parish Jail. He also indicated that the defendant supplied the information listed on her booking sheet (address, telephone number, date of birth, social security number, emergency contact, emergency contact's telephone number) and, thus, understood the questions asked. The trial court denied the motion to suppress, citing Chief Foster's testimony and the questions that were asked and answered.

At trial,[4] Chief Foster testified that, on July 9, 1993, at 11:45 p.m., he questioned the defendant after advising her of her Miranda rights. In response to questioning, the defendant indicated she and Weber had the victim's car, and she had last seen the victim that afternoon. When Chief Foster asked the

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[4] In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may also consider all pertinent evidence given at the trial of the case. *State v. Chopin*, 372 So.2d 1222, 1223 n. 2 (La. 1979).

defendant where the victim was located, she turned her head and started talking about her children.

Additionally, we find no abuse of discretion in the trial court's denial of the motion to suppress. Chief Foster testified that even though the defendant was drunk, she was advised of and understood her Miranda rights prior to questioning. He also indicated the defendant was able to navigate around the interrogation room, was alert during questioning, and competently answered numerous questions. The trial court found the testimony of Chief Foster credible, and there is no basis to overturn that determination.

This assignment of error is without merit.

INCOMPLETE RECORD

In assignment of error number 10, the defendant argues critical omissions from the record occurred when, on numerous occasions during trial, counsel or other individuals approached the bench and engaged in conferences with the judge that were unrecorded. She specifically cites the court interviewing prospective jurors Evans, Lee, and Lenard at unrecorded bench conferences. The defendant also references other unrecorded bench conferences that occurred later at trial.

Louisiana Constitution article I, section 19, guarantees defendants a right of appeal based upon a complete record of all evidence upon which the judgment is based. Additionally, LSA-C.Cr.P. art. 843 in pertinent part provides:

> In felony cases ... the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

Material omissions from the transcript of the proceedings at trial bearing on the merits of an appeal will require reversal. See *State v. Robinson*, 387 So.2d 1143, 1144-1145 (La. 1980) (reversal required when record failed to contain the testimony of a state and a defense expert witness); *State v. Ford*, 338 So.2d 107, 110 (La. 1976) (reversal required when record missing the testimony of four state witnesses and the voir dire of prospective jurors). Conversely, inconsequential omissions or slight inaccuracies do not require reversal. *State v. Scott*, 06-1103 (La. App. 1 Cir. 12/28/06), 952 So.2d 60, 67, writ denied, 07-0275 (La. 10/5/07), 964 So.2d 384.

The Louisiana Supreme Court has never articulated a per se rule either requiring the recording of bench conferences or exempting them from the scope of Article 843. *Scott*, 952 So.2d at 68. However, the Article 843 reference to "objections" and "arguments" generally only applies to objections made in open court and the arguments of counsel in closing, because only those objections and arguments rise to a level of materiality sufficient to invoke Article 843. *Scott*, 952 So.2d at 68. Similarly, the reference in LSA-Const. art. I, §19 to record evidence does not encompass bench conferences, at least not those that do not satisfy the materiality requirements of Article 843. *Scott*, 952 So.2d at 68.

Moreover, the defendant fails to demonstrate any specific prejudice that she suffered as a result of the bench conferences not being transcribed. Nothing in the record suggests that the bench conferences had any discernible impact on the proceedings. See *Scott*, 952 So.2d at 68. In particular, Evans, Lee, and Lenard did not serve on the jury. Accordingly, no reversible error occurred.

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

APPENDIX B

SUPREME COURT OF LOUISIANA

STATE of Louisiana

v.

Elizabeth ZACHARY

2008-K-634 (La. 11/21/08); 995 So. 2d 631

November 21, 2008, Decided

OPINION: WRIT APPLICATION DENIED

APPENDIX C

SUPREME COURT OF LOUISIANA

STATE of Louisiana

v.

Elizabeth ZACHARY

2008-K-634 (La. 11/21/08); 995 So. 2d 631

November 21, 2008, Decided

CONCUR BY: KIMBALL, J.

KIMBALL, J., additionally concurring in the denial of the writ.

I write separately to set forth a more complete version of the facts and procedural history leading up to the instant writ application and this court's denial of the defendant's writ application.

The defendant, Elizabeth Zachary, was originally charged with her former co-defendant, Paul Weber, by grand jury indictment with first degree murder, a violation of LSA-R.S. 14:30, following the murder of George Taylor on the evening of July 9, 1993. The state then severed their cases and amended the indictment with respect to the defendant in this matter to charge her with obstruction of justice in violation of LSA-R.S. 14:130.1, thereby removing the

charge of first degree murder. After trial before a 12-member jury, defendant was found guilty as charged on January 9, 1998. One month later, on February 19, 1998, the state filed a habitual offender bill, charging defendant as a second offender on the basis of a *nolo contendere* plea in Florida to burglary. In response, the defendant filed a motion to quash the habitual offender bill, alleging that the Florida record was devoid of evidence that defendant knowingly and voluntarily waived her rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969). At the sentencing hearing, the State introduced evidence of defendant's predicate conviction, but had been unable to obtain a copy of the transcript of defendant's Florida plea colloquy. Following a hearing in May, 1998, the trial court took the matter under advisement, and on July 30, 1998, the trial court declined to adjudicate defendant an habitual offender because of defects in the plea form used by the state to prove the Florida conviction and sentenced her to ten (10) years imprisonment at hard labor, half of the minimum penalty the defendant would have faced if adjudicated and sentenced as a second offender under La. R.S. 15:529.1 (A)(1)(a). *State v. Zachary*, 01-3191 (La. 10/25/02); 829 So.2d 405, 406. The defendant moved for reconsideration of her sentence, but the motion was denied.

Thereafter, in September, 1999, the state fortuitously found a transcript of the plea colloquy for the Florida conviction, and at the end of November, 1999, moved to reopen the habitual offender proceedings. The trial court denied the State's motion and the State sought writs. Thereafter, the trial court submitted written

reasons, at the State's request, for its decision to refuse to sentence defendant under La. R.S. 15:529.1. The First Circuit granted the State's application and remanded the case to reopen the habitual offender proceedings to allow the State to introduce the Florida transcript. *State v. Zachary*, 00-0579 (La. App. 1 Cir. 4/24/00). On remand, the trial court conducted a hearing, and the State was permitted to introduce a certified copy of the Florida transcript. Following that hearing, the trial court took the matter under advisement and ultimately rendered an opinion in which it found the State's evidence "constitutionally insufficient to hold a defendant a habitual offender." As a result, the trial court quashed the habitual offender bill against defendant, and the State sought writs. The First Circuit denied the State's writ. *State v. Zachary*, 01-2225 (La.App. 1 Cir. 11/5/01). Thereafter, this court granted the State's writ, reversed the trial court's finding that the State had failed to carry its burden under *State v. Shelton*, 621 So. 2d 769 (La. 1993), of showing that the defendant had entered an informed and voluntary no contest plea in Florida to a crime that is the equivalent of a felony offense in Louisiana, and remanded the matter. See, *State v. Zachary*, 01-3191, p. 6 (10/25/02); 829 So. 2d 405, 408 (per curiam). On remand from this court, the court of appeal reversed the granting of the second motion to quash and remanded the case to the trial court for completion of the habitual offender proceedings. *State v. Zachary*, 01-2225 (La. App. 1 Cir. 6/16/03).

The defendant filed a third motion to quash the habitual offender bill.[1] Following a hearing, the trial court found the defendant to be a second-felony habitual offender. In the meantime, defendant secured her release on parole in 2001. Eventually, the litigation ran its course and after more delays the trial court resentenced defendant on October 26, 2005, as a second offender to twenty (20) years imprisonment at hard labor, the mandatory minimum term for a second offender convicted of obstruction of justice when the criminal proceeding involves a crime in which a sentence of death or life imprisonment may be imposed. R.S. 14:130.1 (B)(1). Defendant appealed her conviction and sentence to the First Circuit, which affirmed in an unpublished opinion. *State v. Zachary*, 07-0678 (La. App. 1st Cir. 12/21/07); 973 So. 2d 176. The court of appeal denied rehearing on February 2, 2008. The instant application followed.

While the delays in bringing the habitual offender proceedings to a conclusion are unusual, defendant knew shortly after her conviction that the state would pursue enhanced punishment and the delays stemmed from protracted litigation over a variety of issues, including the sufficiency of the evidence documenting defendant's conviction in Florida used in the present case to enhance her sentence as a second offender. Moreover, as noted by the court of appeal, the delay in completing the habitual offender adjudication cannot be attributed to bad faith or vindictiveness on the part

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[1] The record does not reflect a ruling on the third motion to quash the habitual offender bill but indicates a hearing on the motion was held, and the matter was continued on motion of the defense.

of the State. The delays were largely a result of the defendant's exercise of her right to seek to quash the bill of information and the State's exercise of its right to seek review of adverse trial court rulings with the court of appeal and with this court. Consequently, in my opinion, no due process error has occurred as a result of the various delays in this matter. The majority correctly finds that this writ application should be denied.

APPENDIX D

SUPREME COURT OF LOUISIANA

STATE of Louisiana

v.

Elizabeth ZACHARY

2008-K-634 (La. 11/21/08); 995 So. 2d 631

November 21, 2008, Decided

DISSENT BY: JOHNSON, J.

JOHNSON, J. would grant the writ application and assigns reasons:

The bare facts of this case raise several issues of concern. Defendant, Elizabeth Zachary, was present when her boyfriend, Paul Weber, killed George Taylor, and she assisted with covering up the crime. The state initially charged Weber and Zachary with 1st degree murder, by grand jury indictment. Zachary's case was severed, and charges amended to charge Zachary with obstruction of justice. Paul Weber, her former co-defendant, plead guilty to manslaughter and was sentenced to 40 years, twenty seven years of which were suspended, resulting in an actual sentence of incarceration of 13 years.

On January 9, 1998, after trial, Zachary was found guilty of obstruction of justice in violation of 14:130.1 and sentenced to ten years. A bill of information charging Zachary as a habitual offender was filed a month later, on February 19, 1998, because Zachary had a prior conviction for burglary in Florida. The defense filed a motion to quash the habitual offender bill on July 30, 1998. The trial court judge, Jefferson Hughes, while not ruling on the motion to quash, declined to adjudicate defendant a habitual offender because he found defects in the guilty plea form used by the Florida court in the prior burglary conviction. In fact, Judge Hughes made a hand written note in the record stating that he declined to sentence the defendant as a habitual offender "'to make up' for the fact that the actual killer, Paul Weber, was allowed to plea to a reduced charge [although] he was the actual killer". R., Vol.2, p. 371. The state did not seek supervisory review of the court's determination that there were defects in the guilty plea. In 1999, the state, upon discovery of the guilty plea colloquy in the burglary case, moved to reopen the habitual offender hearing. This prompted the defense to file two additional motions to quash and resulted in protracted litigation.[1] When the state filed their motion to reopen the habitual offender hearing, Zachary was approximately a year and a half away from her parole release date. After serving nearly five years of her sentence for obstruction of justice, Zachary was released on parole in 2001.

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[1] The motions to quash resulted in appeals and writs taken to this Court. *State v. Zachary*, 01-3191, p. 6 (La. 10/25/02), 829 So. 2d 405, 408.

The second hearing on the habitual defender motion was held on October 26, 2005, five years after the first hearing, and seven (7) years after filing the bill of information. At the hearing, a new trial court judge, Elizabeth Wolfe, sentenced Zachary to 20 years imprisonment, which was the mandatory minimum term for a second offender convicted of obstruction of justice when the underlying offense involves a crime in which the sentence of death or life imprisonment may be imposed.[2]

The habitual offender statute contemplates an enhanced sentence based on the maximum sentence for an underlying offense. It should not prescribe a particular enhancement for a sentence, which by virtue of plea agreement and adjudication cannot be imposed. Stated simply, Zachary, in effect, received an enhancement for a life sentence for which no one was ultimately convicted. The defendant is now sentenced to a total of 20 years imprisonment, without the benefit of parole or probation, for her part in covering up the death of George Taylor, while the killer, Paul Weber, has been sentenced to a total of 13 years in custody for the actual killing. The bill of information should have been re-filed to reflect the appropriate maximum sentence as per the adjudicated underlying offense, and I would grant the writ application to consider this disparity.

Considering the length of the delay in prosecution, the delay in the instant case is presumptively prejudicial to the defendant. The defendant has, from all

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[2] R.S. 14:130.1 (b) (1).

accounts, busied herself with her own rehabilitation, excelling at university studies, maintaining gainful employment and is living as a productive member of society. Her case deserves more than a cursory review. She enrolled in, and completed, a paralegal studies certification course at Louisiana State University, remarried, attended church services devoutly, and from all accounts became a model citizen.

Seven (7) years is NOT a "reasonable time" for final adjudication of the habitual offender issue. A defendant charged in a criminal case has the right to be apprized of the undivided, complete consequences of a verdict of guilty within a reasonable time.[3] The trial court's written note that the court would not adjudicate defendant a habitual offender, effectively apprised the defendant that she would not be subject to the consequences of application of the habitual offender statute subsequent to her guilty plea. This Court held in *State v. Muhammed*,[4] that "...the Sixth Amendment will not tolerate unlimited delays in imposing the "sentence for the offense of conviction." Although, the Court in Muhammed, found that completion of the sentence on an underlying offense does not necessarily preclude subsequent multiple offender sentencing, it recognized that fundamental fairness in determining whether a habitual offender hearing is held within a reasonable time, turns upon

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[3] *State v. Broussard*, 416 So.2d at 110-111; *State v. Perkins*, 01-1092 at p. 4, 811 So.2d at 999.

[4] 875 So. 2d. 45, at 54 (La. 2004).

the facts of each individual case.[5] Relevant factors include: 1) length of delay, 2) reason for delay, 3) defendant's invocation of speedy trial rights, and 4) prejudice to the defendant. Specifically, this Court articulated... "a case by case evaluation is warranted to determine whether the proceeding has been properly concluded."[6] This issue should be examined in light of the decision in *State v. Broussard*, 416 So. 2d 109, 110-111 (La. 1982), which held that the filing of a habitual offender bill was not timely when filed 13 months after initial sentencing and just before the defendant's parole release.

We should also examine whether relator's prior burglary conviction was final at the time of the commission of the current offense. In the instant case, the state did not seek supervisory review on the trial court's determination that the Florida guilty plea was defective. The trial judge apparently based his

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[5] There are many instances when the state acted within the time limitation, but the case specific facts deemed the delay as unreasonable and "presumptively prejudicial." In *State v. Reaves*, 376 So.2d 136 (La.1979), the defendant was charged with possession of one marijuana cigarette, a simple misdemeanor offense. The trial was continued four times in the three and one-half months after charges had been filed. On the fourth trial date, the state moved for a continuance because its principal witness was absent. The trial court denied the continuance, and the state entered a *nolle prosequi*. The state then filed a new bill of information, which the defendant moved to quash on the basis that he had been denied his right to a speedy trial. The trial court granted the motion, and this Court affirmed the lower courts' rulings.

[6] *Id* at 55.

decision on the fact that the trial judge in Florida had not signed the guilty plea form, and the minutes of the proceeding indicated that the defendant had not received her Boykin rights.[7] The appellate courts are split on whether a conviction must be final to invoke the habitual offender statute. The Second, Third, Fourth and Fifth Circuits require finality, while the First Circuit rejects this conclusion.

The sentencing disparity in this case is glaring. Using the crime originally charged, as opposed to the crime of conviction in this habitual offender proceeding, results in an excessive sentence, particularly when we consider the light sentence received by the actual perpetrator of the crime. There are numerous examples in our jurisprudence where sentences involving the habitual offender law have been found excessive.[8] Additionally, since there is a great disparity regarding the circumstances under which each District Attorney elects to invoke the habitual offender statute, with some District Attorneys charging every defendant for whom the statute applies, and other District Attorneys not using it at

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[7] R.,Vol. 2, p. 407

[8] *State v. Hayes*, 739 So. 2d 301 (La. App. 1st Cir. 1999) (life sentence for theft over $ 500.00 found excessive), *State v. Ballay*, 727 So. 2d 1199 (La App. 4th Cir. 1999) (15 years for third offense second degree battery found excessive), *State v. Wilson*, 803 So. 2d 102 (La. App. 4th Cir. 2001) (life sentence for third offense distribution of cocaine found excessive), *State v. Robinson*, 713 So.2d 828 (La. App. 5th Cir. 1998) (life sentence for third offense robbery found excessive), *State v. Rice*, 807 So. 2d 350 (La. App. 4th Cir. 2002) (life sentence for third felony offender found excessive).

all, the results vary from parish to parish, which gives rise to constitutional questions of equal protection under the law.

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In the Supreme Court of the United States

ELIZABETH ZACHARY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to Louisiana Supreme Court

BRIEF OF THE ORLEANS PUBLIC DEFENDER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the public defenders of Orleans Parish, Louisiana, move for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has neither confirmed nor denied consent.

Amicus curiae, responsible for representing indigent defendants, has a strong institutional interest in the resolution of the questions raised by the petitioner concerning the constitutionality of the Obstruction of Justice statute in Louisiana. Accordingly, *amicus* should be granted leave to file the attached *amicus curiae* brief, which demonstrates the potential for and reality of abuse of Louisiana's Obstruction of Justice law.

Respectfully submitted,

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOUISIANA COURTS HAVE ELIMINATED JURY REVIEW OF AN ESSENTIAL ELEMENT OF THE OBSTRUCTION OF JUSTICE STATUTE. 3

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE PROSECUTION FOR "OBSTRUCTION OF JUSTICE" IN LOUISIANA IS WIDESPREAD AND SUBJECT TO ABUSE. 6

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....6

In Re Jordan, 913 So.2d 775 (La. 2005) 9

Jones v. United States, 526 U.S. 227 (1999).....4, 5

Kyles v. Whitley, 514 U.S. 419 (1995) 9, 10

Monge v. California, 524 U.S. 721 (1998).....5

Monroe v. Blackburn, 607 F.2d 148 (5th Cir. 1979)...9

Sparf v. United States, 156 U.S. 51 (1895).....4

State v. Ates, 418 So.2d 1326 (La. 1982).....10

State v. Bright, 875 So.2d 37 (La. 2004).....9, 10

State v. Butler, 960 So.2d 1208 (La. App. 2 Cir. 2007).....7

State v. Celestine, 671 So.2d 896 (La. 1996).....7

State v. Cousin, 710 So.2d 1065 (La. 1998) 9, 10

State v. Curtis, 384 So.2d 396 (La. 1980) 10

State v. Davenport, 399 So.2d 201 (La. 1981) 10

State v. Dawson, 490 So.2d 560 (La. App. 4 Cir. 1986).....10

State v. Evans, 463 So.2d 673 (La. 1985) 10

State v. Falkins, 356 So.2d 415 (La. 1978) 10

State v. Felton, 522 So.2d 626 (La. App. 4 Cir. 1988) 10

State v. Green, 493 So.2d 1178 (La. 1986) 9

State v. Hammler, 312 So.2d 306 (La. 1975) 9

State v. Jones, 983 So.2d 95 (La. 2008) 7, 8

State v. Knapper, 579 So.2d 956 (La. 1991) 10

State v. Kyles, 513 So.2d 265 (La. 1987) 8

State v. Lee, 778 So.2d 656 (La. App. 4 Cir. 2001) ...10

State v. Lindsey, 844 So.2d 961 (La. App. 4 Cir. 2003) 10

State v. Marshall, 660 So.2d 819 (La. App. 4 Cir. 1995) 10

State v. McKinney, 961 So.2d 589 (La. App. 2 Cir. 2007) 7

State v. Mims, 637 So.2d 1253 (La. App. 4 Cir. 1994) 10

State v. Newton, 973 So.2d 916 (La. App. 2 Cir. 2007) 7

State v. Oliver, __ So.2d __ (La. App. 4 Cir. 1996) (unpublished) 10

State v. Papillion, 556 So.2d 1331 (La. App. 3 Cir. 1990) 7

State v. Parker, 361 So.2d 226 (La. 1978) 10

State v. Parker, 852 So.2d 3 (La. App. 4 Cir. 2003) ... 7

State v. Perkins, 423 So.2d 1103 (La. 1982) 10

State v. Peters, 406 So.2d 189 (La. 1981) 10

State v. Roberson, 929 So.2d 789 (La. App. 2 Cir. 2006) 7

State v. Simon, 607 So.2d 793 (La. App. 1 Cir. 1992) 7

State v. Thompson, 825 So.2d 552 (La. App. 4 Cir. 2002) 10

State v. Uloho, 875 So.2d 918 (La. App. 5 Cir. 2004) 7

State v. Washington, 977 So.2d 1060 (La. App. 3 Cir. 2008) 7

State v. Watts, 835 So.2d 441 (La. 2003) 8

STATUTES

La. R.S. 14:130.1 ..... passim

La. R.S. 15:529.1 ..... 2, 10

OTHER AUTHORITIES

J. Rakove, Original Meanings, Polictics and Ideas in the Making of the Constitution, New York, Alfred A Knopf (1996) 5

John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 La. L. Rev. 49 (2004) 8

L. Levy, Freedom of Speech and Press in Early American History 133 (1963) 4

T. Green, *Verdict According to Conscience, Perspectives on the English Criminal Trial Jury, 1200-1800*, University of Chicago Press (1985) 5, 6

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a statutorily-created office charged with representing indigent defendants, including those charged with *Obstruction of Justice* under La. R.S. 14:130.1.

Given *amicus curiae*'s institutional responsibilities, the offices of the Orleans Public Defender track and monitor the State's use and misuse of the obstruction of justice statute. *Amicus curiae* also has a critical perspective concerning the unrestrained prosecutorial and judicial discretion ceded within the statute and the Louisiana Supreme Court's interpretation of it. The abrogation of the jury trial right in this context has especially pernicious consequences.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or their counsel made a monetary contribution to this brief.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* now to address and resolve the constitutionality of Louisiana's Obstruction of Justice statute, La. R.S. 14:130.1, which permits the prosecution to prove to a judge (rather than a jury) the facts which determine the maximum available punishment.

In Louisiana, the Obstruction of Justice statute provides three separate penalty ranges depending upon the "proceeding" "obstructed." See La. R.S. 14:130.1(B)(1) (providing forty (40) year maximum for obstruction of justice in case involving a potential life or death sentence); *id.* at (B)(2) (providing twenty (20) year sentence for obstruction of justice of proceeding involving a sentence at hard labor less than life); *id.* at (B)(3) (providing for a five (5) year sentence for the obstruction of a proceeding involving a sentence not at hard labor).[2] Under Louisiana law, the district court rather than a jury makes the factual determination about what type of proceeding was obstructed.

In the preceding eighteen months, the Orleans Public Defender has represented over thirty-five defendants charged with obstruction of justice. In

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[2] The disparate sentencing ranges provided in La. R.S. 14:130.1(B) are magnified in the context of Louisiana's Habitual Offender Law. Under La. R.S. 15:529.1(A), the mandatory minimum for a second offender is half the statutory maximum, and the defendant is subject to twice the maximum term. Thus a defendant with a prior felony conviction is subject to a term of 2 and a half - 10 years for a violation of La. R.S. 14:130.1(B)(3); 10-40 years for a violation of La. R.S. 14:130.1(B)(2); and 20-80 years for a violation of La. R.S. 14:130.1(B)(1).

each of these cases, the defendant confronted the prospect of a judge and not a jury making the factual finding that determines the maximum punishment.

This case arises at a time when obstruction of justice laws are being "used increasingly." *State v. Jones*, 983 So.2d 95, 99 (La. 2008). Moreover, the Louisiana statute gives the State wide latitude to prosecute based upon a subjective determination that the defendant has not cooperated with the police or authorities. *Id.* at 102 ("This statute gives prosecutors wide latitude. . ."). Indeed, "[a] current investigation is not required." *Id.* at 103.

Given this wide latitude, a jury check on each element of the offense is an essential check on state authority. However, under Louisiana law, the judge rather than the jury is given the responsibility for determining which type of proceeding is obstructed. This determination raises the maximum available punishment four-fold. When combined with Louisiana's Habitual Offender law, the judge's determination raises the minimum and maximum punishment eight-fold.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOUISIANA COURTS HAVE ELIMINATED JURY REVIEW OF AN ESSENTIAL ELEMENT OF THE OBSTRUCTION OF JUSTICE STATUTE.

In 1735, John Peter Zenger[3] was prosecuted for seditious libel under a statute which required the

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[3] This Court has observed that at least one authority suggests:

jury to determine whether the defendant was guilty of printing and publishing the material but left to the judge the determination whether the words were libelous.[4]

In Louisiana, today, a defendant is charged with "Obstruction of Justice" under a statute which permits the jury to determine whether the defendant obstructed a proceeding, but leaves to the prosecutor and judge to determine what type of proceeding the defendant obstructed.

This Court, in *Jones v. United States*, noted the particularly pernicious impact that arises from the:

> the leading account of Zenger's trial was, with one possible exception "the most widely known source of libertarian thought in England and America during the eighteenth century." . . .It is just as much beyond question that Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion. See supra, at 17-20. One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need "to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.

Jones v. United States, 526 U.S. 227, 247-48 (1999) (citing L. Levy, *Freedom of Speech and Press in Early American History* 133 (1963)).

[4] Cf. *Sparf v. United States*, 156 U.S. 51, 146 (1895) (Justices Grey and Shiras dissenting).

> attempts to confine jury determinations in libel cases to findings of fact, leaving it to the judges to apply the law and, thus, to limit the opportunities for juror nullification. Ultimately, of course, the attempt failed, the juries' victory being embodied in Fox's Libel Act in Britain, see generally T. Green, Verdict According to Conscience 318-355 (1985), and exemplified in John Peter Zenger's acquittal in the Colonies, see, e.g., J. Rakove, Original Meanings 300-302 (1996). It is significant here not merely that the denouement of the restrictive efforts left the juries in control, but that the focus of those efforts was principally the juries' control over the ultimate verdict, applying law to fact (or "finding" the law, see, e.g., id. at 301), and not the factfinding role itself. . . . That this history had to be in the minds of the Framers is beyond cavil.

Jones v. United States, 526 U.S. 227, 247-48 (1999).[5] See also *Apprendi v. New Jersey*, 530 U.S. 466

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[5] See also *Monge v. California*, 524 U.S. 721, 728-29 (1998) (Scalia, J. dissenting) (observing that the Sixth Amendment would not tolerate the provision of a jury trial on a limited question of culpability, leaving to the judge the determination of the essential fact that determined the maximum punishment as "If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, 'vain and idle enactments, which accomplished nothing, and most

(2000); *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia J. concurring) ("[A]s I reaffirmed by joining the opinion for the Court in *Apprendi*, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."). The lack of a jury check is especially pernicious in the context of offenses that could be described as crimes against the state or court; the very parties that might be described as a "victim" of the obstruction of justice are left to determine the maximum available punishment.

Whether for *Zenger* or *Zachary*, a scheme that provides for a jury determination of one element while providing that the judge determine the second fact, gives the façade of jury trial without any of its protection.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE PROSECUTION FOR "OBSTRUCTION OF JUSTICE" IN LOUISIANA IS WIDESPREAD AND SUBJECT TO ABUSE.

The *Zachary* case is not an anomalous instance of the operation of an imperfect statute but rather an

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unnecessarily excited Congress and the people on [their] passage.'").

example of a widespread practice with a significant impact on the operation of the justice system.[6]

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[6] See e.g., *State v. Jones*, 983 So.2d 95, 103 (La. 2008) (obstruction of justice charged where the defendant dropped a bag of marijuana from pocket when approached by the police on the ground that "a current investigation is not required."); *State v. Newton*, 973 So.2d 916, 922 (La. App. 2 Cir. 2007) (finding no *Apprendi* violation where "The trial court was only required to make a determination of the underlying criminal proceedings (as charged in the bill) that were the basis for the obstruction of justice charge."); *State v. Washington*, 977 So.2d 1060 (La. App. 3 Cir. 2008) (upholding sentence to ten years for, inter alia, obstruction of justice based upon an attempt to destroy evidence); *State v. McKinney*, 961 So.2d 589, 597 (La. App. 2 Cir. 2007) (upholding 5 year sentence for obstruction of justice); *State v. Butler*, 960 So.2d 1208, 1210 (La. App. 2 Cir. 2007) (upholding conviction for attempted obstruction of justice for allegedly tampering with evidence in a criminal proceeding in which a sentence of death or life imprisonment may be imposed); *State v. Roberson*, 929 So.2d 789, 804 (La. App. 2 Cir. Apr. 19, 2006) (upholding trial court's sentence of 40 years to defendant convicted of obstruction of justice); *State v. Uloho*, 875 So.2d 918 (La. App. 5 Cir. 2004), 888 So.2d 192; *State v. Parker*, 852 So.2d 3 (La. App. 4 Cir. 2003), (unpub'd), vacated on other grounds, 03-2736 (La. 2/20/04), 868 So.2d 23 (prosecution for obstruction of justice where defendant dropped a marijuana cigarette to the ground and then stomped on it in an attempt to obliterate); *State v. Celestine*, 671 So.2d 896 (La. 1996) (prosecution for obstruction of justice where the defendant purchased six rocks of crack cocaine from an undercover agent posing as a dealer, and upon immediate arrest, threw the rocks into the air and only one could be located from the gravel surface); *State v. Simon*, 607 So.2d 793 (La. App. 1 Cir. 1992), writ denied, 612 So.2d 77 (La. 1993) (obstruction of justice charged where the defendant flushed drugs down toilet); *State v. Papillion*, 556 So.2d 1331 (La. App. 3 Cir. 1990) (same). It is important to note that – in part because of the lack of jury trial protection -- the vast majority of obstruction of justice cases result in a plea.

Indeed, as the Louisiana Supreme Court has made clear, the charge of *Obstruction of Justice* is increasingly being used by prosecutors to bolster ancillary charges. See *State v. Jones*, 983 So.2d 95, 99 (La. 2008) ("This case comes at a time when obstruction of justice laws are being 'used increasingly against drug offenders who, in some fashion, attempt to destroy or conceal their drugs when being pursued by the police.'" (citing John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 La. L. Rev. 49, 51-52 (2004)); see also *id.* at 100 (noting the Louisiana statute is broader [than other states], as it includes within the definition of "tampering with evidence" the "intentional alteration, movement, removal, or addition" of any object or substance "at the location of any incident which the perpetrator knows or has good reason to believe will be the subject of any investigation.").[7]

The obstruction of justice statute also provides the state with a significant prosecutorial tool, in which accomplices, witnesses, and even defense lawyers can be charged with obstruction of justice for actions that – in the subjective view of the prosecutor – impede the prosecution.[8]

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[7] *Jones* recognizes that "This statute gives prosecutors wide latitude in misdemeanor cases to prosecute a person for obstruction. . . ." However the Court determined that this latitude was ameliorated by the "room for leniency" given to the sentencing judge. *Id.* at 103. The possibility of judicial leniency does not resolve the *Apprendi* problem.

[8] *State v. Watts*, 835 So.2d 441 (La. 2003), (noting that State's snitch/accomplice witness Anthony Spears was charged with obstruction of justice); *State v. Kyles*, 513 So.2d 265 (La. 1987) reversed on other grounds (noting that State witness was

Over the past eighteen months, there have been thirty-five charges of obstruction of justice in Orleans Parish alone. As in the *Zachary* case, a significant number of these individuals have also been charged under the habitual offender provisions of La. R.S. 15:529.1. These provisions result in the exponential increase in both the minimum and the maximum punishment available based upon the trial court's finding of what type of proceeding the defendant obstructed.

Amicus Curiae from Orleans Parish has a special interest in the resolution of this issue because, under the holding below, the circumstances in which the jury trial check is most essential become the circumstances in which its protection is most limited. Given a history in which Orleans Parish prosecutors have "tacked too close to the wind,"[9] the need for a

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subject to obstruction of justice charge if he failed to co-operate); *State v. Green*, 493 So.2d 1178, 1182 (La. 1986) (noting that defendant's attorney would have been subject to criminal prosecution for failing to disclose evidence provided to him under the attorney-client privilege); *State v. Hammler*, 312 So.2d 306, 310 (La. 1975) (noting "defense counsel are not exempted from prosecution under the statutes denouncing the crimes of obstruction of justice and subornation of perjury"). The potential for deleterious use of the statute is exacerbated where the jury check is eliminated.

[9] It must be observed that Louisiana (and Orleans Parish particularly) has been marred with jarring instances of prosecutorial indiscretion. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 441 (1995); *Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979); *In Re Jordan*, 04-B-2397 (La. 06/29/2005); 913 So.2d 775 (suspending Orleans Parish prosecutor for failing to turn over exculpatory information); *State v. Bright*, 02-KP-2792 (La. 05/25/04); 875 So.2d 37; *State v. Cousin*, 96-KA-2973 (La. 4/14/98), 710 So.2d 1065 (reversing on other grounds but noting

jury check on prosecutorial charging and judicial fact-finding is essential.

Certiorari review is further warranted here because the potential for significant criminal exposure (up to 80 years in prison) without a jury

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that in capital murder case, "[t]he prosecutor did not disclose this obviously exculpatory statement to the defense prior to the trial"); *State v. Lindsey*, 02 2363 (La. App. 4 Cir. 4/2/03), 844 So.2d 961; Michael Perlstein, *Jordan drops charges in 1975 murder; Two men freed on eve of retrial*, Times Picayune (New Orleans, La.), June 24, 2003, at Metro 1; *State v. Thompson*, 02-0361 (La. App. 4 Cir. 7/17/02), 825 So.2d 552; Gwen Filosa, *N.O. man cleared in '84 murder; New trial in Liuzza killing brings an emotional end to epic case*, Times Picayune, May 9, 2003, at National 1 (after retrial, Thompson acquitted in less than one hour); *State v. Lee*, 00-2429 (La. App. 4 Cir. 1/4/01); 778 So.2d 656; *State v. Marshall*, 81-3115 (La. App. 4 Cir. 9/5/95), 660 So.2d 819; *State v. Mims*, 94-0333 (La. App. 4 Cir. 1994); 637 So.2d 1253; *State v. Falkins*, 356 So.2d 415 (La. 1978); *State v. Parker*, 361 So.2d 226 (La. 1978); *State v. Curtis*, 384 So.2d 396 (La. 1980); *State v. Perkins*, 423 So.2d 1103 (La. 1982); *State v. Evans*, 463 So.2d 673 (La. 1985); *State v. Knapper*, 579 So.2d 956 (La. 1991); *State v. Oliver*, 94-1642, p. 30-34 (La. App. 4 Cir. 1996)("[a] prosecutor should not fail to make timely disclosure, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."); *State v. Ates*, 418 So.2d 1326, 1329 (La. 1982); *State v. Peters*, 406 So.2d 189 (La. 1981); *State v. Davenport*, 399 So.2d 201, 204 (La. 1981); *State v. Dawson*, 490 So.2d 560, 563 (La. App. 4 Cir. 1986); *State v. Felton*, 522 So.2d 626, 627 (La. App. 4 Cir. 1988); *State v. Rosiere*, 488 So.2d 965, 969-71 (La. 1986) (failure to turn over statements of witnesses inconsistent with the prosecution case). Indeed, of the seven men exonerated from Louisiana's death row since 1981, four were prosecuted in Orleans Parish, and all four of these cases *Kyles*, *Cousin*, *Thompson* and *Bright* involved *Brady* violations.

determination may impel defendants to accept a plea and waive appellate review. Thus, though defendants are routinely charged with obstruction of justice in Orleans Parish, there are relatively few instances in which the statutory scheme can be challenged.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully suggests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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